

1
2 UNITED STATES DISTRICT COURT
3 WESTERN DISTRICT OF WASHINGTON
4 AT SEATTLE

5 WISE,

6 Plaintiff(s),

7 v.

8 VERIZON COMMUNICATIONS, INC., et al.,

9 Defendant(s).

NO. C08-409MJP

ORDER ON MOTION TO DISMISS
AND MOTION TO STRIKE
SURREPLY

10 The above-entitled Court, having received and reviewed:

- 11 1. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) (Dkt. No. 10)
- 12 2. Plaintiff's Response (Dkt. No. 12)
- 13 3. Defendants' Reply (Dkt. No. 14)
- 14 4. Plaintiff's Surreply (Dkt. No. 15)
- 15 5. Plaintiff's Statement of Additional Authority (Dkt. No. 16)
- 16 6. Plaintiff's Second Statement of Additional Authority (Dkt. No. 19)
- 17 7. Defendants' Motion to Strike Plaintiff's Surreply and Statement of Additional Authority (Dkt.
18 No. 19)
- 19 8. Plaintiff's Response to Motion to Strike (Dkt. No. 21)
- 20 9. Defendants' Reply (Dkt. No. 23)

21 and all exhibits and declarations attached thereto, makes the following ruling:

22 IT IS ORDERED that the motion to strike Plaintiff's surreply is GRANTED.

23 IT IS FURTHER ORDERED that Defendants' Motion to Dismiss is GRANTED.

1 **Background**

2 Plaintiff was employed by Defendant Verizon Communications, Inc. (“Verizon,” which was
3 “GTE” at the time), then left in 1997 to work for another employer. She was re-employed by Verizon
4 in March 1999. As part of her re-hire, Plaintiff alleges that Verizon agreed to “bridge” Plaintiff’s time
5 of service back to her original 1995 hire date – this was significant in terms of calculating her eligibility
6 for benefits. Plaintiff received a letter from the GTE Employee Records Center dated April 7, 2000
7 which she claims memorialized this agreement: “This service has adjusted your Service Date to
8 12/19/95, which will now be used to administer your non-pension benefits, such as vacation eligibility,
9 short-term sickness disability benefits, etc.” (Plaintiff Exh. 2, CF000085)

10 Plaintiff had received a diagnosis of Multiple Sclerosis (MS) during her first period of
11 employment with GTE/Verizon. She alleges that Defendant was aware of this diagnosis. She applied
12 for short-term disability benefits following her re-hire; when those ran out, she applied for long term
13 disability (“LTD”) benefits under the GTE plan (“the Plan”), identifying breast cancer complicated by
14 MS as the basis for her claim. Defendant’s insurer (co-Defendant Metropolitan Life Insurance
15 Company (“Met Life”)) approved Plaintiff’s LTD benefits claim on August. 2, 2000 and
16 communicated that approval by a letter dated August. 8, 2000. Plaintiff continued to receive
17 disability benefits through August. 2, 2001, but on July 16, 2001, she received a letter from Met Life
18 containing their conclusion that her MS symptoms were not severe enough to warrant a finding of
19 total disability.

20 Plaintiff appealed the denial, and her appeal was rejected on October 17, 2001. That denial
21 claimed (for the first time, according to Plaintiff) that her MS was a “pre-existing condition” excluded
22 from coverage. This finding was based on Defendants’ conclusion that her benefits commenced from
23 the date of her re-hire (i.e., that there was no “bridging” of benefits from her previous GTE
24 employment). Plaintiff appealed to the GTE Benefit Center Review Unit (and provided them with
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1 information regarding the “bridging” of her benefits). On March 8, 2002, the GTE Review committee
2 issued a final denial of her appeal, which was communicated to Plaintiff by a letter dated March 14,
3 2002.

4 On March 11, 2008, Plaintiff filed this lawsuit, alleging causes of action for recovery of
5 employee benefits under ERISA, breach of fiduciary duty, equitable relief, fraud, misrepresentation
6 and negligence. Dkt. No. 1.

7 **Discussion/Analysis**

8 **First Cause of Action: Recovery of Employee Benefits (29 U.S.C. 1132(a)(1)(B))**

9 Defendants allege that Plaintiff’s First Cause of Action (ERISA violation) fails to state a claim
10 upon which relief can be granted because it is not timely filed.

11 ERISA contains no statute of limitations relative to causes of action for § 502(a)(1)(B) claims
12 for benefits (Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643,
13 646 (9th Cir. 2000)); courts must look to analogous state statutes of limitation, usually those for
14 contract actions. Reed v. United Transp. Union, 488 U.S. 319, 323, 327 (1989); Flanagan v. Inland
15 Empire Elec. Workers Pension Plan & Trust, 3 F.3d 1246, 1252 (9th Cir. 1993).

16 Plaintiff does not disagree that we must look to the Washington contract statutes of limitation
17 to determine the timeliness of her complaint. The dispute on this point centers around what *kind of*
18 contract – Defendants argue that the time bar must be calculated under the oral contract statutory
19 limits (3 years; RCW 4.16.080(3)); Plaintiff argues that this case concerns a written contract and we
20 must apply the 6-year statute of limitations under RCW 4.16.040(1).

21 Plaintiff does not have a written contract upon which to plead her case. In order for a
22 document to legally constitute a written contract, the writing must contain all of the essential contract
23 elements: at the very least, the subject matter, the identities of parties, the promise, and the terms and
24 conditions. Bogle & Gates P.L.L.C. v. Zapel, 121 Wn.App. 444, 448-49 (2004). If parol evidence is
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1 needed to establish any required element, “the contract is partly oral and the three-year statute of
2 limitations applies.” Barnes v. McLendon, 128 Wn.2d 563, 570 (1996).

3 There are two documents which could arguably constitute the “written contract” upon which
4 Plaintiff argues she is entitled to plead. The first is the Plan, the written long-term disability plan
5 under which Plaintiff claims she is entitled to LTD benefits. Complaint, Ex. 3. As a written contract,
6 however, this Plan is fatally flawed. Nowhere does it identify Plaintiff by name. DePhillips v. Zolt
7 Constr. Co., Inc. (136 Wn.2d 26 (1998)) is controlling: the failure to specifically identify the plaintiff
8 as the contracting party “does not sufficiently establish the parties to and the terms and conditions of
9 the contract. Accordingly, the six-year statute of limitations in RCW 4.16.040(1) does not apply.” Id.
10 at 29.

11 Elsewhere in her briefing, Plaintiff takes the position that the “bridging memo” of April 7, 2000
12 is a “written contract that is not fully integrated” (Response, p. 8) . This document is a letter of
13 confirmation/explanation sent to Plaintiff 13 months after her re-hire. Under the requisite contractual
14 elements enumerated *supra*, it is not a written contract. For one thing, there is an absence (as in the
15 DePhillips case) of terms and conditions. Even if Plaintiff could overcome that obstacle, what is left
16 is, at best, a partly written and partly oral contract.

17 When parol evidence is required to establish the subject matter of a contract, then “the contract
18 is partly oral and the three-year statute of limitations applies.” Barnes v. McLendon, 128 Wn.2d 563,
19 570 (1996); *see also* DePhillips, 136 Wn.2d at 31. It is true, as Plaintiff points out, that the
20 introduction of parol evidence does not automatically convert a written contract into an oral one, but
21 to avoid that result the parol evidence must be used “to interpret the meaning of what is already in the
22 contract” (DePhillips, 136 Wn.2d at 32), not to supply an essential but missing element of the
23 agreement.

1 As a contract, the “bridging memo” is missing an essential element; namely, it does not specify
2 that LTD benefits are among those which were “bridged” upon Plaintiff’s re-hire (the memo refers to
3 Plaintiff’s “non-pension benefits, such as vacation eligibility, short-term sickness disability benefits,
4 *etc.*”; Krafchick Decl., CF00085; emphasis supplied). In fact, Plaintiff had to submit a declaration
5 from the GTE District Manager explaining that the “etc.” included LTD benefits (Bryan Decl., Plaintiff
6 Ex. 1). The Court finds that the Bryan Declaration is parol evidence required to supply a missing
7 element of the contract, thereby converting it to an oral contract with a 3-year statute of limitations.

8 Plaintiff argues that the memo clearly refers to “non-pension benefits,” and the Bryan
9 Declaration simply interprets the use of “etc.” in that phrase as meaning “plus LTD benefits.” The line
10 between “interpreting the meaning” and “supplying a missing element” is not a bright one, but the
11 Court is persuaded in Defendants’ favor by the fact that the “element” of the contract upon which
12 Plaintiff has based her theory of recovery is the existence of “long-term disability benefits” which
13 bridge back to her original employment. It is not possible to know that the “bridging memo” includes
14 that element without resort to the parol evidence supplied by Plaintiff.¹ It is a missing element which
15 the Bryan Declaration was required to supply. The end result is that Plaintiff has not plead a cause of
16 action under a written contract and therefore was required to bring her action within three years, a
17 deadline she was well past when she filed this lawsuit.²

18 The Court is aware that this is a harsh result, but under the circumstances no other ruling is
19 possible. Plaintiff cannot prevail on her untimely First Cause of Action and, as the remainder of the
20 opinion demonstrates, is foreclosed on her remaining causes of action as well.

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22 ¹ Plaintiff did not supply any evidence that the term “non-pension benefits” is commonly understood, in
23 Plaintiff’s industry or in the human resources field, to include long-term disability benefits.

24 ² Defendants also argue that, even if Plaintiff does have a written contract upon which to base her ERISA
25 claims, the cause of action accrued at breach (the final denial of her claims on March 8, 2002) and thus her March 11,
2008 filing is still outside the statute of limitations. Based on the finding that Plaintiff does not have a written contract,
the Court does not reach that issue.

1 Second Cause of Action: Breach of Fiduciary Duty

2 A claim for breach of fiduciary duty based on denial of individual benefits requires an allegation
3 that “the denial is part of a ‘larger systematic breach of fiduciary obligations.’” Reynolds v. Fortis
4 Benefits Ins. Co., 2007 WL 484782, at p. 8 (N.D. Cal., Feb. 9, 2007) (quoting Mass. Mutual Life Ins.
5 Co. v. Russell, 472 U.S. 134, 142 (1985)). Plaintiff’s failure to allege anything larger in scope than
6 the mishandling of her personal benefits, or to allege that her injury is part of a larger scheme by
7 Defendants entitles them to dismissal of this cause of action. Reynolds at p. 8.

8 Third Cause of Action: Equitable Relief under 29 U.S.C. 1132(a)(3)

9 The Supreme Court has held that § 1132(a)(3) equitable relief is not available where a plaintiff
10 also seeks to recover under a claim for benefits pursuant to §1132(a)(1)(B). Varity Corp. v. Howe,
11 516 U.S. 489, 515 (1996). Plaintiff’s equitable relief claim is duplicative of her request for past and
12 future long-term disability benefits and thus is barred.

13 Fourth Cause of Action: Fraud, Misrepresentation and Negligence

14 ERISA contains a preemption clause which specifically precludes state law claims – the federal
15 statutory scheme “supercede[s] any and all State laws insofar as they may now or hereafter relate to
16 any employee benefits plan...” Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-45, 47 (1987); 29
17 U.S.C. § 1144(a). Nor is ERISA’s preemptive impact limited to laws “specifically designed” to affect
18 employee benefit plans. District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 129-
19 30 (1992).

20 Furthermore, Plaintiff’s state law causes of action are barred by their applicable statutes of
21 limitation. Her claim for equitable relief and her claims for fraud, negligent misrepresentation and
22 negligence are all subject to 3-year statutes of limitations (RCW 4.16.080; RCW 4.16.080(2); RCW
23 4.16.080(4)). Regardless of when the claims accrued, Plaintiff is well past the limitation periods for
24 recovery on any state law tort violations.

1 Defs' Motion to Strike Surreply and Supplemental Authority

2 On June 10, 2008, Plaintiff filed a 4-page surreply to “clarify Plaintiff’s position with respect to
3 the causes of action claimed and those to be pursued.” Surreply, p. 1. On June 11, she filed a
4 “Statement of Supplemental Authority,” attaching a June 2, 2008 Arizona federal court opinion,
5 Solien v. Metropolitan Life Ins. Co. (2008 Dist. LEXIS 43194). On June 27, she filed a “Second
6 Statement of Additional Authority,” attaching a June 19, 2008 Supreme Court opinion, Metropolitan
7 Life Ins. Co. v. Glenn, 2008 LEXIS 5030, 76 U.S.L.W. 4495.

8 Defendants objected to all the supplemental filings, citing to Local Rule 7(g) for the
9 requirement that a party filing a surreply must (1) notify all parties and chambers of their intention, (2)
10 limit the surreply to 3 pages, (3) limit the surreply to requests to strike material in the reply, and (4)
11 file the pleading within five judicial days of the reply brief. With the exception of the timing of her
12 filing, Plaintiff’s pleading violated every one of these requirements.

13 Defendants cite LR 7(d)(3) for the rule that all opposition papers must be filed no later than the
14 Monday prior to the noting date (June 2, 2008), Since the opinions Plaintiff cited were issued on or
15 after that date, she could not have filed them by then. But in deference to the local rules, she should
16 have at least requested permission for any filings made past the noting date of the motion.

17 Plaintiff counsel’s response to the motion to strike is less than persuasive. Although Mr.
18 Krafchick acknowledged that he was aware of LR 7(g), he reports that he saw “no proscription on
19 filing a Surreply to respond to argument raised in the Reply...” and goes on to state that “every so
20 often I have filed surreplies if there was a good reason . . . It helps the understanding of Plaintiff’s
21 position and causes no prejudice to Defendants.” Response to Mtn to Strike, p. 2. If all counsel
22 followed this logic, the Court would be subjected a never-ending stream of surreplies, sur-surreplies,
23 sur-sur-surreplies, etc. The only sensible reading of the rule is that surreplies are limited to requests to
24 strike objectionable material in reply briefing, and that such pleadings must be noticed to the court and
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1 opposing counsel prior to filing. Plaintiff's surreply satisfies none of these elements and will be
2 stricken.³

3 A party is not precluded from filing additional authority that becomes available after the noting
4 date but before the motion has been ruled on, assuming it is relevant and impacts the substance of the
5 motion. The defect in these particular pleadings is Plaintiff's submission of them without a single word
6 of explanation or discussion concerning their relevance to the issues before us, leaving the Court to
7 figure out what the relevance of the new opinions might be to the pending matter. Plaintiff's counsel
8 provided some explanation at oral argument concerning his rationale for citing the new case law. The
9 Court has reviewed and taken these new cases under advisement, and does not find anything in either
10 opinion which warrants alteration of the underlying ruling.

11 **Conclusion**

12 Plaintiff's ERISA claim is based, at best, on a contract that is only partly written and partly
13 oral. Therefore it is subject to a 3-year statute of limitations and is not timely filed. Her remaining
14 claims are barred by a combination of ERISA preclusion provisions, binding legal precedent and
15 statute of limitations problems. The Court will GRANT Defendants' motion to dismiss.

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17 The clerk is directed to provide copies of this order to all counsel of record.

18 Dated: September __26__, 2008

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21 Marsha J. Pechman
22 U.S. District Judge

23
24 ³ Plaintiff's counsel also e-mailed the Court following oral argument to provide further response to questioning
25 which had occurred during the hearing. The Court has never countenanced continuations of oral argument via e-mail,
and will not do so here. The material will be stricken and disregarded.